

Periodic Tenant's Repair Obligation in Absence of Covenant

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PERIODIC TENANT'S REPAIR OBLIGATION IN ABSENCE OF COVENANT

I. INTRODUCTION

The question to be considered here is the extent of the repair obligation of a periodic tenant in the absence of any covenant defining such repair obligation. The short- and medium-term periodic tenancy has become increasingly common in the experience of the average American city-dweller. Textwriters have recognized its sociological importance.

"The common varieties of estates from period to period are the estate from year to year, from month to month, and from week to week. In rare instances an estate from day to day is found.

"These estates include the arrangements under which the majority of our urban dwellers live. Persons in the lower income groups—even those in the lower middle income groups—do not customarily occupy under written leases or have estates for years. They "rent" a space in which to live, agreeing to pay so much every week or every month, out of the periodically received pay check or pay envelope. Duration of the occupancy is undisclosed.

"This type of estate is tremendously important sociologically in that occupancy thereunder conditions the home life of a very substantial fraction of the population. On the other hand, the financial smallness of the involved rights results in a great dearth of reported decisions from the courts concerning them. Their legal consequences are chiefly based in the "over the counter" mass handling of "landlord and tenant" cases of the local courts. So this type of estate, judged sociologically, is of great importance, but judged on the basis of its jurisprudential content, is almost negligible."¹

The sociological importance of these estates has also been noted in an article in the *FORDHAM LAW REVIEW* wherein it is said:

"The length of the term of moderately and low priced apartments is commonly left to the whim of the gods, but the rent is "so much" per month. In an industrial democracy the individual may well be chary of tying himself down as a tenant to any one place—his job may be here today, elsewhere the next or gone entirely. If he works his income is wont to be regular and fixed in weekly or biweekly units; his ability to pay rent from month to month varies little. The month is likely to be the measure of his obligation to pay rent. Under such circumstances, and, in general, in the absence of countervailing indicia, a tenancy from month to month would seem called for whenever the only indication of the term is the monthly rental payments."²

¹ 2 POWELL, *REAL PROPERTY* 373 (1954).

² 7 *FORDHAM L. REV.* 167 (1938).

Because of this sociological importance of periodic tenancies and the paucity of written authority from appellate courts concerning the repair obligation of tenants holding under them in the absence of covenant, this article will attempt to discover some of the more important factors which the courts have considered in defining this obligation on the part of the tenant.

II. HISTORICAL DEVELOPMENT

Before attempting to set forth any of the rules as they exist today, it would be profitable to examine the historical aspect of the law in this area. By the rule of the ancient common law,³ a tenant for life, or for years, or at will was not liable for waste. At this time, no mention was made of the periodic tenant because the periodic tenancy did not appear upon the scene until the sixteenth century. It is said by Holdsworth that:

"It was in the course of the sixteenth century that the estate from year to year made its appearance."⁴

The reasons why tenants for life, or for years, or at will were not liable for waste were twofold: (1) these tenancies were created by act of the parties and if the landlord desired to hold the tenant liable for waste he should have so stipulated in the lease; (2) the acts of waste on the part of the tenant at will terminated his estate. He became a mere trespasser instead of a tenant.

The first reason is indicated by the writings of the authorities in this area. It is said in the *AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW* that:

"At the common law, a tenant for life or years was not liable for waste, because it was presumed that the demise or lease creating his estate would have provided against waste if it were to be prohibited . . ."⁵

Kent and Thompson indicate the same reason in their works.

"At common law, no prohibition against waste lay against the lessee for life or years, deriving his interest from the act of the party. The remedy was confined to those tenants who derived their interest from the act of the law; . . ."⁶

" . . . waste would not lie at common law, against the lessee for life or for years; for the lessor might have restrained him by covenant or condition."⁷

"At common law, the only parties liable for waste were tenants of legal estates, *i.e.*, estates which were created by act of law as distinguished from those created by act of the parties."⁸

³ Prior to 1267.

⁴ 7 Holdsworth, *HISTORY OF ENGLISH LAW* 243 (1924).

⁵ 28 *AM. & ENG. ENCYC. LAW* 891 (1st ed. 1895).

⁶ 4 *KENT'S COMM.* 78 (rev. ed. 1892).

⁷ *Id.* at 81.

⁸ 4 Thompson, *REAL PROPERTY* 105 (perm. ed. 1940).

The second reason exists where the tenant holds as a tenant at will. In the case of such a tenant, an act which would otherwise constitute waste terminates the tenancy and thus the tenant is no longer a tenant and cannot be held liable for waste as such. He becomes a mere trespasser, and there is a possibility that he may be held liable in trespass.⁹ This is indicated in COKE'S COMMENTARY upon Littleton when he says:

"But if tenant at will commit voluntary waste, as in pulling down of houses, or in felling of trees, it is said that the lessor shall have an action of trespass for this against the lessee."¹⁰

"And true it is, that if tenant at will cutteth down timber trees, or voluntarily pull down and prostrate houses, the lessor shall have an action of trespass against him, *quare vi et armis*; for the taking upon him power to cut timber, or prostrate houses, concerneth so much the freehold and inheritance, as it doth amount in law to a determination of his will; and so hath it bene adjudged."¹¹

This is also stated by modern textwriters.¹²

The ancient common law rule was changed with the passage of a statute. The Statute of Marlbridge¹³ provided:

"Also fermors (firmarii) during their terms shall not make waste, sale nor exile of houses, wood and men, nor of anything belonging to the tenements they have to ferm, without special license had by writing of covenant making mention that they may do it; if they do and thereof be convict, they shall yield full damage and shall be punished by amerciamment greviously."¹⁴

The Statute of Gloucester provided:

"That a man from henceforth shall have a writ of waste in chancery against him that holdeth by law of England, or otherwise for a term of life, or for a term of years, or a woman in dower; and he which shall be attainted of waste shall lose the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at."¹⁵

These statutes have been commonly construed as making a tenant for life or for years liable for waste. Thus, it is said that:

"... the common law was changed by the statutes of Marlbridge (52 HEN. 3) and Gloucester (6 EDW. 1, ch. 5), and tenants for life and years were made liable for waste."¹⁶

⁹ See *Chalmers v. Smith*, 152 Mass. 561, 26 N.E. 95 (1891); where it is said that a tenant at will who commits waste is liable to his landlord in an action of trespass *quare clausum*—his act terminates his rights as a tenant and entitles the landlord to treat him as a trespasser.

¹⁰ 1 CO. LITT. 71 (19th ed. 1853).

¹¹ *Ibid.*

¹² Burby, REAL PROPERTY 43 n. 37 (2d ed. 1954).

¹³ 1267, 52 HEN. III, c. 23.

¹⁴ The translation is Coke's, 2 CO. INST. 145 (2d ed. 1836).

¹⁵ 1278, 6 EDW. I, c. 5.

¹⁶ *Supra*, note 5.

The Statute of Marlbridge was the basic one which accomplished this purpose. The term "firmarii" within it was interpreted to include both tenants for years and for life.¹⁷ The Statute of Gloucester merely created a new procedure, the writ of waste, and a new remedy, treble damages and forfeiture. It is doubtful that it broadened the group of persons liable for waste or varied the determination of what acts were waste. Its effect was merely to provide a new procedure and a new remedy.¹⁸

Although these Statutes made tenants for life and for years liable for waste, they did not affect tenants at will.

"Tenants in dower, by the curtesy, for life or lives, and for years, were included in the Statute of Gloucester. Tenants at will were always considered as omitted from the Statute of Marlbridge, as well as from the statute of Gloucester, and, therefore, continued not to be punishable for . . . waste, . . ."¹⁹

This is also stated by a well known English textwriter²⁰ and a classic English case.²¹

III. NATURE OF PERIODIC TENANCY

Before attempting to discover what are the present rules concerning periodic tenancies, it would be well to examine the nature of a periodic tenancy and determine whether it more closely approximates a tenancy for years or a tenancy at will. It is defined by Tiffany²² as:

" . . . all tenancies which are in their nature such as will endure for a certain period, and will continue for subsequent successive periods of the same length unless terminated by due notice, at the end either of the first period or one of the successive periods."

"It was in the course of the sixteenth century that the estate from year to year made its appearance. The creation of these estates, rather than estates at will, was probably due to the inconvenience of estates at will. The tenant at will had no certain interest; and his right to emblements made the land of very little value to the landlord, who was practically deprived of the rent of the land while the right to emblements lasted. It was better, both from the point of view of tenant and of the landlord, that the tenant should have a better defined interest. From the point of view of the tenant, because he had a more assured position; and from the point of view of the landlord, because he was entitled to rent to the end of the term."²³

¹⁷ "... both Coke and Blackstone interpreted the term "firmarii" to include both tenants for years and for life." 5 AM. LAW OF PROPERTY 109 (1st ed. 1952).

¹⁸ This is the interpretation given it by the authors of AM. LAW OF PROPERTY, *id.* at 110.

¹⁹ 4 Thompson, *op. cit. supra* note 8, at 113.

²⁰ 3 Holdsworth, *op. cit. supra* note 4, at 125.

²¹ The Countess of Shrewsbury's Case, 5 Coke 14, 77 Eng. Rep. 68.

²² 1 Tiffany, REAL PROPERTY 264 (3rd ed. 1939).

²³ 7 Holdsworth, *op. cit. supra* note 4, at 243.

The periodic tenancy arises today in four principal situations: (1) where the parties expressly create one; (2) where there is no original letting for a definite period and the acts of the parties create a tenancy the duration of which is not predetermined, but the year or a fraction thereof is the basis upon which the rent is paid; (3) where there is a valid lease for a definite term but a holdover takes place and with the consent of the landlord the tenant continues to occupy the premises paying periodic rent; (4) where there is a lease which is invalid under the Statute of Frauds but the lessee occupies and pays periodic rent.²⁴

It can readily be seen that the periodic tenancy came into being for an express purpose—to remedy some of the evils of the tenancy at will. Since it was created to avoid the evils of the tenancy at will it seems absurd to attempt to say that it is nothing more than a tenancy at will in disguise. Rather, it seems that the better view is that a periodic tenancy is essentially a tenancy for years. The important distinguishing characteristic is the specific date at which it can be terminated. This view has been expressed by legal writers. In an article in the *FORDHAM LAW REVIEW*, Philip Marcus states that:

"It would seem . . . improper to categorize periodic tenancies as merely a form of the tenancy at will. The established place which the periodic tenancy occupies in the classification of estates in land and in the law of landlord and tenant merit its consideration as something more than a tenancy at will. There are several incidents attached to this form of tenancy which are not reproduced in a tenancy at will."²⁵

Tiffany, Powell, and *THE AMERICAN LAW OF PROPERTY* adopt much the same view:

"A tenancy from year to year, though resembling in some degree a tenancy at will, in that the continuance of the holding beyond the end of any year is dependent on the will of the parties, nevertheless resembles a tenancy for years rather than a tenancy at will, in that it is a tenancy for one year at least."²⁶

"While the estate from period to period lasts, the lessor and the lessee have a relationship substantially identical with that . . . concerning estates for years. The rules . . . on the lessee's right to the possession and use of the premises, the location of responsibility for repairs and for the condition of the premises all apply."²⁷

"As developed by the parties and the courts, periodic tenancies, except as to termination, have the same incidents as estates for years."²⁸

²⁴ These categories are suggested in: 7 *FORDHAM L. REV.* 167 (1938).

²⁵ *Ibid.*, The incidents mentioned are: (1) Necessity of notice to terminate; (2) Right to assign without the lessor's consent; (3) Effect of death of either party.

²⁶ 1 Tiffany, *REAL PROPERTY* 381 (1954).

²⁷ 2 Powell, *REAL PROPERTY* 381 (1954).

²⁸ 1 *AM. LAW OF PROPERTY* 222 (1st ed. 1952).

In order to uphold the view that a periodic tenancy more closely resembles a tenancy for years than it does a tenancy at will, the statement of the Wisconsin Court in the case of *Sutherland v. Drolet*²⁹ must be distinguished. The Court there said that a periodic tenancy is nothing more than a modified form of a tenancy at will. This case can be distinguished on the ground that the Court was only speaking of the meaning of "periodic tenancy" under the Wisconsin statute dealing with the termination of tenancies.³⁰ It seems that the Court was attempting to correct an oversight of the Legislature in omitting to mention periodic tenancies in Sec. 234.03, WIS. STATS. It desired to protect periodic tenants by bringing periodic tenancies within the section, and it did so by saying that the periodic tenancy is nothing more than a modified form of the tenancy at will, which is covered by the statute.

IV. GENERAL RULES

In setting forth the general rules concerning the repair obligations of a periodic tenant in the absence of covenant the tendency of the courts has been to speak in very general and ambiguous terms. They have recognized two varieties of implied covenants.³¹ Some courts and textwriters have used the language used in an early Pennsylvania decision which said:

"A tenant is bound to commit no waste, and to make fair and tenantable repairs, . . ."³²

Other courts and textwriters have used language similar to that of an early New York case:

"There is an implied covenant in every hiring that the tenant will surrender the premises at the end of the term in as good condition as they were at the commencement of the term, . . ."³³

²⁹ 154 Wis. 619, 143 N.W. 663 (1913).

³⁰ WIS. STATS. §234.03 (1955): Tenacies, how terminated.

"Whenever there is a tenancy at will or by sufferance, created in any manner, the same may be terminated by giving at least 30 days' notice in writing to the tenant requiring him to remove from the demised premises, or by the tenant's giving at least 30 days' notice in writing that he shall remove from said premises, and by surrendering to the landlord the possession thereof within the time limited in such notice; but when the rent reserved in a lease at will is payable at periods of less than one month such notice shall be sufficient if it be equal to at least the interval between the times of payment; and in all cases of neglect or refusal to pay the rent due on a lease at will at least 14 days' notice to remove given by the landlord, shall be sufficient to determine the lease."

³¹ *Infra*, note 73.

³² *Long v. Fitzsimmons*, 1 Watts. & S. 530 (1841), at 532. Other courts and textwriters using similar language: *Suydam v. Jackson*, 54 N.Y. 450 (1873); *U.S. v. Bostwick*, 94 U.S. 53 (1876); *Warren v. Wagner*, 75 Ala. 188 (1883); *Van Wormer v. Crane*, 51 Mich. 363, 16 N.W. 683 (1883); *Patton v. U.S.*, 139 F. Supp. 279 (1955); 4 Thompson, REAL PROPERTY 111 (perm. ed. 1940); 1 Washburn, REAL PROPERTY 501 (6th ed. 1902).

³³ *Myers v. Hussenburth*, 65 N.Y. Supp. 1026 (1900). Other courts and textwriters using similar language: *Carlin v. Ritter*, 68 Md. 478, 13 Atl. 370 (1888); *Earle v. Arbogast*, 180 Pa. 409, 36 Atl. 923 (1897); *Mansfield Motors*

The source of this implied obligation of which the courts and text-writers speak is indicated in the case of *Van Wormer v. Crane*³⁴ wherein it is said:

"The bare relation of landlord and tenant is a sufficient consideration for an implied promise to treat the premises occupied . . . in a good and proper manner, . . ., and to make the ordinary repairs thereto,"

In setting forth the general rule, the courts have also set forth various exceptions thereto. Thus, it has been said that the tenant's implied obligation to make repairs or to surrender the premises in the same condition as when received does not extend to a situation where the condition necessitating the repairs is: (1) the result of ordinary wear and tear;³⁵ (2) the result of unavoidable accident or act of God;³⁶ (3) within the class known as general or substantial repairs;³⁷ (4) due to the landlord's negligence.³⁸

The courts refer to this failure on the part of the tenant to make ordinary tenantable repairs, or to return the premises in as good a condition as when received, as waste. Waste:

" . . . may be defined to be any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of an inheritance, or to destroy the identity of the property or impair the evidence of title."³⁹

Two varieties of waste have been recognized:

"Waste is divided into two classes, voluntary waste, which usually consists of affirmative acts on the part of the tenant in pos-

v. Freer, 42 Ohio App. 214, 182 N.E. 51 (1932); U.S. v. Jordan, 186 F.2d 803 (1951); Rountree v. Thompson, 226 N.C. 553, 39 S.E. 2d. 523 (1946); 32 AM. JUR., LANDLORD & TENANT 665.

³⁴ *Supra*, note 32.

³⁵ Rountree v. Thompson, *supra*, note 33; 4 Thompson, *supra*, note 32; 1 Washburn, *supra*, note 32.

³⁶ Rountree v. Thompson, *supra*, note 33, at 525, holds that:

"The implied covenant does not, . . ., extend to the loss of buildings by fire, flood, tempest, or enemies which it was not in the power of the lessee to prevent, and there is no implied covenant that the lessee shall restore the buildings which have been destroyed by accident without fault on his part . . . destruction by the act of God, or by the public enemy, or by accident, or by the act of the lessor, are exculpatory exceptions to the general rule of liability."

³⁷ Gott v. Gandy, 2 El. & Rl. 845, 118 Eng. Rep. 984 (1853); Deutsch v. Abeles, 15 Mo. App. 398 (1884).

³⁸ Stevens v. Schweizer, 94 Misc. Rep. 646, 158 N.Y. Supp. 465 (1916).

³⁹ 4 Thompson, *op. cit. supra*, note 32, at 104. Another definition of waste is given in Graffell v. Honeysuckle, 30 Wash. 2d 390, 191 P. 2d 858 (1948), at 863:

"Waste, . . ., is an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in its substantial injury. It is the violation of an obligation to treat the premises in such manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any wilfull or negligent act."

session, causing damages to the premises, and permissive waste, which involves acts of omission rather than commission on the part of such tenant."⁴⁰

These definitions seem to indicate that any time the force which caused the damage had its origin in some act on the part of the tenant, the case will be one of voluntary waste. Thus, if a tenant be chopping wood and negligently allows the ax to slip out of his hand and break a window, this would seem to be a case of voluntary waste. It would be an affirmative act on the part of the tenant which results in damage to the premises. This limits the area of permissive waste to cases in which the force which caused the damage to the premises is some person or thing other than the tenant.

It seems that any time the courts can find that the force which caused the damage had its origin in some act on the part of the tenant, which enables them to classify the case as one of a voluntary waste, they will hold the tenant liable for repairs.

"The rule has been declared in general terms that a tenant, no matter what the duration of his term, is liable to his landlord for voluntary or commissive waste."⁴¹

In an early United States Supreme Court case⁴² involving a periodic tenancy with no covenants as to repairs the tenant tore up gardens and tore down certain fences and walls without the permission of the landlord. The landlord was allowed to recover for damage done to the property on the ground that the destruction of the garden, fences and walls constituted voluntary waste and was a violation of the implied covenant to exercise reasonable care to prevent damage to the inheritance.

In the Massachusetts case of *Chalmers v. Smith*⁴³ the tenant overloaded a barn which was only meant for the storage of hay. He stored heavier materials in it and the building was damaged by reason of the weight. The court allowed the landlord to recover the damages. It held that this constituted voluntary waste — it was a positive unreasonable act of a kind likely to cause damage to the landlord's property.

An early New York case⁴⁴ considered the question of whether the periodic tenant could be held for voluntary waste when the actual act

⁴⁰ 2 Tiffany, REAL PROPERTY 630 (3rd ed. 1939).

⁴¹ 4 Thompson, REAL PROPERTY 113 (perm. ed. 1940); accord, *Corvell v. Snyder*, 15 Cal. App. 634, 115 Pac. 961 (1911); *White v. Wagner*, 4 Harr. & J. 373 (1818); *Boefer v. Sheridan*, 42 Mo. App. 226 (1890); *Powell v. Dayton, S. & G.R. Co.*, 16 Or. 33, 16 Pac. 863 (1888); *Kingston v. Lehigh Val. Coal Co.*, 236 Pa. 350, 84 Atl. 820 (1912).

⁴² *U.S. v. Bostwick*, *supra*, note 32.

⁴³ *Supra*, note 9.

⁴⁴ *Regan v. Luthy*, 11 N.Y. Supp. 709 (1890).

which caused the waste was committed by an unknown third person. In that case, the tenant moved out and closed up the house; within a few days the plumbing was cut out. The court held that this, even though the act of strangers, constituted voluntary waste. An early Maryland case held the tenant liable for voluntary waste when the house held by him was destroyed by an armed mob. The court said that the tenant had used the house for a different purpose than that for which it was leased and the acts of the mob, provoked by the acts of the tenant, must be imputable to the tenant.⁴⁵ Thus, it seems that the courts will in some cases go to the extent of saying that acts of a stranger which would constitute voluntary waste if performed by the tenant may be imputable to the tenant so as to hold him liable for voluntary waste.

The fact situations become less definite, as do the courts, in the area of permissive waste. Because of this, it is important to look into the fact situations and attempt to determine what factors the courts have weighed in determining whether or not to hold the tenant liable.

The fundamental consideration under the modern law is that in order to sustain a finding of permissive waste, it must appear that the tenant was negligent. This has been indicated by modern authorities.⁴⁶ It is said in *AMERICAN LAW OF PROPERTY* that:

"The decisions seem to establish clearly that liability for permissive waste turns upon proof of the existence of a duty to repair, and resulting injury to the inheritance for failure to perform that duty."⁴⁷

⁴⁵ *White v. Wagner*, *supra*, note 41; (Tenant used building for purposes of distribution of political newspaper; building destroyed by mob).

⁴⁶ In *Beekman v. Dolsen*, 63 Hun. 487, 18 N.Y. Supp. 376 (1892), at 377, it is said:

"Permissive waste implies negligence, which may consist either of acquiescence or assent in the acts of strangers, or failure to prevent such acts, or to do that which is incumbent upon the party in possession as matter of good husbandry. But the very essence of liability for permissive waste must be negligence."

Accord:

Rogers v. Atl., G. & P. Co., 213 N.Y. 246 (1915).

Burby, *REAL PROPERTY* 36 (2d ed. 1954); states:

"An injury which results from the occupant's mere failure to act, when it was his duty to act, is permissive waste."

It is stated in an article in the *COLUMBIA LAW REVIEW* that:

"The cases of waste for non repair, . . . , are all grounded on the destruction or dilapidation resulting from the tenant's default." 8 *COL. L. REV.* 628 (1908).

Mansfield Motors v. Freer, *supra*, note 33; in this case, the court refused to allow the landlord to recover damages for a broken window because of a failure on his part to show that it had been broken through the negligence of the tenant.

⁴⁷ 5 *AM. LAW OF PROPERTY* 101 (1st ed. 1952).

This statement corresponds to the elements listed by Prosser as being necessary to sustain a finding of negligence: (1) a legal duty to conform to a standard of conduct for the protection of others against unreasonable risks;

This is a relatively modern doctrine which did not exist at the ancient common law, under which the strict rules favoring the landlord had their origin. Its importance from the viewpoint of the tenant cannot be overstressed. Its very existence indicates that the landlord will no longer be able to hold the tenant liable for repairs on the basis of little or no proof.

In an early New Jersey case⁴⁸ the tenant of a green house allowed tables therein to become rotten and dilapidated, the roof to become rotten, unstable and liable to fall down and one of the boilers to break and remain out of repair. The court held that the tenant was liable for permissive waste. All of the damages here were readily apparent to the tenant; thus, it is not difficult to show that the tenant knew of the need for the repairs and breached his duty in not making them.

The case of *Fash v. Kavanagh*⁴⁹ indicates that the courts may allow other factors to override a possible finding of negligence on the part of the tenant. It held that a tenant from month to month was not bound to either see to the erection of a proper sink or privy upon the premises, or to cause it to be emptied to prevent an overflow. It seems that the tenant might have been found negligent because of his failure to stop the overflow, but the court held for the tenant and refused to allow the landlord to recover for rent accruing after the tenant surrendered possession because of the overflowing privy. The court allowed two factors to override the possibility of the tenant's negligence: (1) the value of the leasehold (rent and term considered); (2) the availability of the landlord. The tenant here was a resident of a tenement house renting a single room. The value of such a leasehold is comparatively small and the landlord or his representative is generally on the premises.

The factor of custom in the community was suggested by the case of *Breen v. Walters*.⁵⁰

The question arises as to whether the tenant is liable for the negligent acts of third persons. It has already been determined that he is liable for voluntary waste when such third persons commit voluntary acts causing damage to the premises wherever the tenant's conduct invited or exposed the premises to such acts.⁵¹ The courts which have considered the question have not been in accord. In a New York case⁵² it was said that:

(2) a breach of that duty; (3) a reasonably close causal connection between the conduct and the resulting injury; (4) actual loss or damage; PROSSER, HORNBOOK on TORTS 165 (2d ed. 1955).

⁴⁸ *Newbold v. Brown*, 44 N.J.L. 266 (1882).

⁴⁹ 24 How. PRAC. 347 (1861).

⁵⁰ 150 La. 578, 91 So. 50 (1922).

⁵¹ *Supra*, note 45.

⁵² *Rogers v. Atl. G. & P. Co.*, *supra*, note 46.

"In no case in this state, . . . , has a tenant been held liable as for permissive waste for the negligent acts of strangers."

However, cases in other jurisdictions have held the tenant liable for permissive waste caused by the negligent acts of a third person. In a Missouri case⁵³ the court said:

"Tenants are answerable for waste committed by a stranger, and they take their remedy over against him; and it is a general principle that the tenant, without some special agreement to the contrary, is responsible to the reversioner for all injuries amounting to waste done to the premises during his term, by whomsoever the injuries may have been committed, The tenant is like a common carrier, and the law, in this instance, is founded on the same great principles of public policy."

In a Massachusetts case,⁵⁴ a plate-glass window in the leased premises was broken through the negligence of a complete stranger without fault on the part of the tenant. The court held the tenant liable. This case seems to indicate that a tenant is liable for permissive waste when damage is occasioned by the negligence of a complete stranger.⁵⁵ An old Missouri case seems to indicate that a tenant will be similarly liable for damage occasioned by the negligence of his employee.⁵⁶ These cases have been cited by some textwriters as indicating liability on the part of the tenant.⁵⁷ However, it seems that these old cases which hold the tenant liable for the negligence of a complete stranger are open to criticism. They were decided at a time prior to the emergence of the modern short-term periodic tenancy as a major class of tenancy; and, like the early common law, they exhibited an obvious bias in favor of the landlord. It is believed that the rule is not as broad as these cases indicate.

The English cases involving the repair obligation of a periodic tenant in the absence of covenant have attacked the problem in a somewhat different manner. They have, generally, avoided any mention of the term "waste."

"In the English cases . . . , in which an obligation to make repairs is asserted as against a tenant from year to year, the failure to make them is not termed permissive waste, and the obligation seems rather to be based upon an implied agreement"⁵⁸

In an early case,⁵⁹ in which a periodic tenant damaged the ceiling and walls of a building by the removal of shelves and pictures there-

⁵³ *Mason v. Stiles*, 21 Mo. 374, at 375 (1855).

⁵⁴ *Leominster Fuel Co. v. Scanlon*, 243 Mass. 126, 137 N.E. 271 (1922).

⁵⁵ *Ibid.*

⁵⁶ *Supra*, note 53.

⁵⁷ 2 *Tiffany*, REAL PROPERTY 655 (3rd ed. 1939); AM. JUR., LANDLORD & TENANT 669.

⁵⁸ 2 *Tiffany*, REAL PROPERTY 651 (3rd ed. 1939).

⁵⁹ *Horsefall v. Mather*, 171 Eng. Rep. 141 (1815); noted in 9 ENG. RUL. CAS. 465.

from, it was held that the tenant was not liable to the landlord. The court said that a periodic tenant is bound only to use the premises in a "husband-like" manner. The court seemed to place much weight on the fact that the landlord was put to only small expense in refitting the premises. This suggests another factor which the courts will consider: the extent of the repairs to be made, as measured by cost. Is the repair a major or minor one?

In 1832, the English court stated the tenant's obligation in terms of the ability of the premises to withstand the action of the elements. *Auworth v. Johnson*⁶⁰ said that a tenant from year to year is bound only to keep premises wind and water tight. In 1916, the English court combined the terms "husband-like manner" and "wind and water tight" in a statement of the tenant's repair obligation;⁶¹ and in 1927, the court resorted to the use of the term "tenant-like manner" when it said that the tenant is under an implied obligation, in the absence of covenant, to use the premises in a "tenant-like manner."⁶²

The latest expression of the English court came down in the 1953 case of *Warren v. Keen*. The case involved a tenant from week to week. The alleged items of disrepair were: (1) decay of interior plaster and paint work; (2) a leak in the hot water boiler. The court said again that the only duty of the tenant is to use the premises in a tenant-like manner.⁶³ It refused to hold the tenant liable and in so doing suggested another factor which the courts will consider: the ratio between the cost of the repair and the rent for the period for which the tenant is assured of possession. It said:

"It is difficult to think of repairs which would not in themselves cost more than the weekly rent in many cases . . ."⁶⁴

The failure of the English cases to mention waste raises the question of remedies. There are basically two possible remedies for a tenant's failure to make repairs: (1) a tort action for waste; (2) an action for breach of the covenant to repair or to return the premises in as good condition as when received. By their failure to mention waste it seems that the English courts indicate a preference for the use of the action for breach of covenant. American courts, it seems, recognize both remedies. Thus, Tiffany says:

"The right to recover damages for waste is not affected by the fact that the lease contains an express covenant not to commit waste, or to yield up the premises in good condition at the end of

⁶⁰ 5 Carr. & P. 239, 172 Eng. Rep. 955 (1832); accord, *Leach v. Thomas*, 7 Carr. & P. 327, 173 Eng. Rep. 145 (1855).

⁶¹ *Wedd v. Porter*, 2 K.B. 91 (1916).

⁶² *Marsden v. Heyes*, 2 K.B. 1 (1927).

⁶³ *Warren v. Keen*, 1 Q.B. 15, at 20 (1953).

⁶⁴ *Ibid.*, at 19.

the term. The landlord has the option of suing on the covenant or of bringing an action on the case, . . . , directly for waste."⁶⁵

When the action is on the covenant, it seems that there is no necessity of proving negligence on the part of the tenant. The courts base their decision upon the question of whether or not the repairs come within the express or implied words of the covenant. All the landlord needs to show is that the repairs come within the covenant, and that they have not been made.⁶⁶

V. ANALOGY TO CASES INVOLVING EXPRESS COVENANTS

Because of the paucity of cases in the appellate courts of this country involving a periodic tenant's repair obligation in the absence of express covenant⁶⁷ it will be profitable to draw an analogy between cases in which the courts have implied covenant⁶⁸ and cases in which similar covenants have been expressly inserted in the lease by the parties.⁶⁹

The case of *Leominster Fuel Co. v. Scanlon*⁷⁰ involved a covenant to make tenantable repairs. A plate-glass window in the leased premises was broken through the negligence of a complete stranger who ran into it from the street. The tenant brought an action against the landlord to recover the cost of replacing the window. The court held for the landlord. This case is not cited because the writer approves of its result. It seems that the result should have been in the tenant's favor under the modern doctrine because of the landlords failure to show negligence upon the part of the tenant. The case is cited⁷¹ only because it does suggest some factors which courts may consider in determining whether or not to hold a tenant liable for repairs. The factors suggested are: (1) the availability of the landlord; (2) the threat of progressive damages arising out of the initial damage. In a case involving a broken window or other injury causing a breach in the sheathing of the premises so as to render them something less than wind and water tight, there is a definite threat of steadily increasing damage to the interior of the building if the breach is allowed to remain. This factor of threat of progressive damages is also indicated in other cases.⁷²

⁶⁵ 2 Tiffany, REAL PROPERTY 663 (3rd ed. 1939).

⁶⁶ Cases in which the action was on the covenant: *Van Wormer v. Crane*, *supra*, note 32; *Leahy v. Wenonah Theater Co.*, 251 Mich. 594, 232 N.W. 184 (1930).

⁶⁷ See *supra*, note 1.

⁶⁸ See *supra*, notes 32 & 33.

⁶⁹ There are three main types of express covenants as set forth in the case of *Finnegan v. McGavock*, 230 Wis. 212, 283 N.W. 321 (1939). They are: (1) a covenant to surrender the premises in as good condition as when received, reasonable wear and tear excepted; (2) a covenant to repair; (3) a covenant granting abatement of rent.

⁷⁰ *Supra*, note 54.

⁷¹ *Ibid.*

⁷² *Proudfoot v. Hart*, L.R. 25 Q.B. Div. 42 (1890), held that the fact that a

It would be well to examine some cases involving covenants to surrender the premises in as good condition as when first received, reasonable wear and tear excepted. Is there any basic difference in legal effect between these covenants and covenants to make ordinary tenantable repairs? It would seem not.

"A covenant to deliver up the premises in as good condition as when received is really a covenant to repair."⁷³

The distinction seems to lie only in the manner of approaching the problem. In the case of a covenant, express or implied, to make ordinary tenantable repairs, the essence of the problem is whether or not the repair in question comes within the definition of "ordinary tenantable repairs." In the case of a covenant to surrender the premises in as good condition as when first received, reasonable wear and tear excepted, the preliminary inquiry is whether the premises were surrendered in as good condition; if not, then the crucial inquiry must be as to whether the alleged damages were caused by reasonable wear and tear. Thus, most cases involving such covenants turn upon the term "reasonable wear and tear." Such a covenant was construed in *Davenport v. U.S.*⁷⁴; the Court indicated the difficulty in the area when it said:

"To mark the line between the repairs which would have been needed because of the ordinary wear and tear and those needed because of the improper use by the defendants has been somewhat difficult. There is no fixed rule of law or fact, which enables a court to distinguish between the two classes of damage."

"While the lessor is entitled to receive his property in good condition, 'wear and tear' excepted, he is not entitled to charge the lessee with all the decay and damage that may have happened during the continuance of the lease."

The same type covenant was interpreted in *Kann v. Brooks*.⁷⁵ The court said:

"... an agreement to turn over the premises at the end of the term in as good condition as they were ... in does not require

window was broken as the result of a storm, or other external agency, does not relieve the tenant of his duty to replace it under a covenant to make tenantable repairs.

In *Suydam v. Jackson*, *supra*, note 32, at 454, it is said:

"If a window in a dwelling should blow in, the tenant could not permit it to remain out and the storms to beat in and greatly injure the premises without liability for permissive waste; ..."

⁷³ 1 AM. LAW OF PROPERTY 350 (1st ed. 1952).

⁷⁴ 26 Ct. Cl. 338 (1891), at 343.

⁷⁵ 54 Ind. App. 625, 101 N.E. 513 (1913), at 515. This case involved the lease of a stone mill, the court said:

"The reasonable wear and tear of a stone mill, and the machinery, tools, and equipment belonging thereto, would necessarily include decay of timbers, the wearing out and giving way of various parts of the buildings, machinery, tools, and other parts of the plant and its equipment."

the tenant to make good to the landlord depreciation due to such wear and tear of the premises as is incident to the use for which they were leased."

In *Finnegan v. Mc Gavock*⁷⁶ the Wisconsin Court held that such a covenant did not require the tenant to reconstruct a wooden coal elevator that had become unusable by gradual slow deterioration produced by heat, cold, rain and other weather conditions.

VI. STATUTES ALLOWING SURRENDER OF POSSESSION WITHOUT LIABILITY FOR RENT

What is the effect of a statute which allows the tenant to surrender possession, without liability for rent subsequent to the surrender of possession, if the premises become untenable and unfit for occupancy "without his fault or neglect."⁷⁷ The problem is whether a failure on the part of the tenant to make tenantable repairs, or to return the premises in as good condition as when received, excludes him from the statutory phrase "without his fault or neglect" so as to bar the tenant from using the statute as a defense.

In *Suydam v. Jackson*⁷⁸ the roof of the leased premises began to leak and the tenant gave notice that the premises were untenable and surrendered possession of them. (The roof had been worn out by the action of the elements and by age.) The tenant set up as a defense to the landlords' action for rent the New York statute.⁷⁹ The court allowed the landlord to recover the rent. It found that these were repairs which should have been made by the tenant. The court said, in effect, that the statute was not intended to have any effect upon the rule requiring the tenant to make ordinary tenantable repairs. Thus, it seems that the court found that the failure to make tenantable repairs was such "fault or neglect" on the part of the tenant as to ban him from invoking the protection of the statute.

⁷⁶ *Supra*, note 69.

⁷⁷ WIS. STATS. §234.17 (1955): Lessee may surrender premises when. Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender."

⁷⁸ *Supra*, note 32.

⁷⁹ LAWS OF 1860, ch. 345, provided:

"... that the lessees or occupants of any building, which shall, without fault or neglect on their part, be destroyed or be so injured by the elements or any other cause as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises, and of the land so leased or occupied."

In *May v. Gillis*⁸⁰ the statute involved was a substantial re-enactment of the statute involved in the *Suydam* case.⁸¹ It was also identical to the present Wisconsin statute, Sec 234.17.⁸² A heavy fall of snow caused part of the roof to give way and the city building department tore down the rest of the roof because of its unsafe condition. The tenant moved out and the landlord brought action to recover the rent. The trial court held for the landlord. The appellate court reversed, ordered a new trial, and said that a covenant on the part of the lessee to repair would not prevent the tenant from availing himself of the statute; read in connection with the statute it would bind the tenant to repair subject to the qualification that, in case the premises should be destroyed or should become untenable without his fault, he might abandon them and terminate the lease. The court went on to say that if the tenant is to be held liable there must be a necessary implication from the lease of an intention that the rent should continue, notwithstanding the occurrence of the events mentioned in the statute. It is believed that this case is in complete accord with *Suydam v. Jackson*.⁸³ The opposite result at which the court arrived can be distinguished on the facts. Here, the damage was caused by a heavy fall of snow. This may be considered an act of God,⁸⁴ and is thus within one of the exceptions to the tenant's obligation to repair.

It therefore seems that these statutes will not have any effect upon the tenant's basic obligation to make ordinary tenantable repairs, or to return the premises in as good condition as when received, and if the tenant fails to comply with this obligation he is guilty of such "fault or neglect" as will bar him from invoking the protection of the statute.

VII. CONCLUSION

As was stated in the body of this article, there is a decided paucity of recent appellate court decisions involving the repair obligation of a periodic tenant in the absence of covenant. The textwriters, possibly because of the paucity of modern decisions, have shown a distinct tendency to follow indiscriminately the reasoning of the old cases. It should be noted that the basic circumstances of the landlord-tenant relationship have changed since most of these old cases were decided. Most landlords are no longer absentee landlords as they were at common law. Today the landlord, or his representative, is generally available at least once a month, when the rent is collected, if not oftener. Thus, there is little danger of damage being done to the property without the landlord's knowledge.

⁸⁰ 169 N.Y. 330, 62 N.E. 385 (1901).

⁸¹ *Supra*, note 32.

⁸² *Supra*, note 77.

⁸³ *Supra*, note 32.

⁸⁴ *Supra*, note 36.

The courts, in determining whether or not to hold a periodic tenant liable for any given repair, will first consider one key factor: the extent to which the tenant is involved in causing the initial damage; that is, whether the waste is voluntary or permissive. When the damage results from an act on the part of the tenant himself, other than acts in the ordinary course of occupancy, the courts will classify it as voluntary waste and hold the tenant liable for repairs. When the damage is the result of nonaction on the part of the tenant, the landlord, to establish permissive waste, must prove that the tenant was negligent in failing to act to prevent the damage.

When the damage results from the act or omission of a third person who is a complete stranger to the tenant, the tenant will generally not be held liable to make the repairs, with one caveat: in a case where the tenant's act or omission to act invited, or exposed the premises to, damages resulting from such act or omission on the part of the third person, the tenant will probably be held liable. The tenant may be said to be negligent in inviting, or exposing the premises to, damages.

When the tenant is not in any way involved in causing the initial damage; that is, when it is the result of purely natural forces or of an act of God, the tenant is generally not liable. In this situation the tenant cannot be said to be negligent. Repairs occasioned by an act of God are beyond the limits of what is reasonable and usual.

Within the framework of these general rules the courts will consider a number of other factors:

(1) A threat of progressive damage if the repair is not made immediately.—The most common situation would be that of a broken window or a leaky roof. If the repair is not made immediately, there is a distinct threat of much greater damage to the interior of the premises. Failure to make such repairs is a departure from the standard of conduct of a reasonable tenant. The courts will readily find the tenant negligent and hold him liable for permissive waste if he does not make them. He will be liable, if not for the repairs, at least for the resultant damages.

This factor operates to create a partial exception to the general rule in cases where the damage to the premises is the result of ordinary wear and tear or an act of God.

(2) The magnitude of the repair as measured by its cost.—The courts will be very reluctant to hold a tenant liable when the cost of the repair is either very small or very large. Very low cost repairs are often within the area of ordinary wear and tear. Extremely costly repairs are within the area of substantial repairs and are likely to be ruled beyond the reasonable scope of the implied repair obligation.

Under this factor the courts will also consider the value of the leasehold, as measured by rent and term, and the ratio between the cost of the repair and the rent for the period of time for which the tenant is assured of possession. Even if it can be shown that the tenant was negligent in failing to make the repair, the court is not likely to burden him with repair costs which are greater than the rental value for the shortest period of time in which he can be evicted. To do so would encourage the landlord to evict a periodic tenant shortly after the tenant had made costly repairs and re-rent the premises at a higher rate.

(3) The purpose for which the premises were let.—If the tenant uses the premises for unusual or unauthorized purposes, the courts will find that his act in departure from the contemplated use of the premises was not the conduct of a reasonable tenant. He will be liable, as for voluntary waste, on account of all damage incident to such use.

(4) Community custom as to which party usually makes such repairs.—If the repair is one which ordinarily is made by tenants in the particular area, the courts will more readily hold the tenant negligent in not making such repair.

Under the early common law, the principal, if not the sole factor considered on the issue of the tenant's liability for repairs was the tenant's right of exclusive control. Because of this right the fact of tenancy presupposed an obligation to repair. It is the writer's conclusion that the modern law reverses this principle. If the landlord desires to hold the tenant liable for waste, he must assume the burden of proving one of three things: (1) voluntary waste by the tenant; (2) permissive waste: that is, negligence and the fact that there are no other factors present to override the finding of negligence; or (3) damages to the premises of such an aggravated nature as to raise at least an inference of negligence, (a presumption in some states), through the application of the doctrine of *res ipsa loquitur*.

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